

No. 78-1055

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

FAIRCHILD INDUSTRIES, INC., PETITIONER

v.

HONORABLE ALEXANDER HARVEY, II,
UNITED STATES DISTRICT JUDGE

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

BRIEF FOR THE RESPONDENT
IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 33a-44a) is reported at 581 F. 2d 1103. The oral opinion of the district court (Pet. App. 45a-57a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1978. On October 19, 1978, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including December 31, 1978, "without prejudice to the Court's consideration of whether this application has been filed on time." The petition for a writ of certiorari was filed on December 29, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals abused its discretion in denying a writ of mandamus to direct the district court to hold an evidentiary hearing into allegations that the government was misusing an ongoing grand jury proceeding.
2. Whether the assistance provided to the grand jury by Internal Revenue Service personnel conflicts with *United States v. LaSalle National Bank*, 437 U.S. 298 (1978).
3. Whether the involvement in the grand jury proceeding of Internal Revenue Service personnel who also participated in a civil tax audit of petitioner constitutes a conflict of interest that invalidates the grand jury's investigation.

STATEMENT

Petitioner is the subject of a pending federal grand jury investigation into possible criminal violations of the Internal Revenue Code.¹ Following several years of civil audit and a criminal tax investigation of petitioner, the Internal Revenue Service referred the case to the Department of Justice for presentation to a grand jury (Pet. App. 34a). Thereafter, a grand jury was empanelled in the United States District Court for the District of Maryland, and grand jury subpoenas were issued to

¹On September 8, 1978, following the court of appeals' denial of mandamus and dismissal of petitioner's appeal (Pet. App. 33a-34a), the grand jury indicted petitioner and its chairman, Edward G. Uhl, on two counts of willfully filing false corporate income tax returns for the years 1971 and 1972, in violation of 26 U.S.C. 7206. The grand jury investigation, which had initially been opened to consider the taxable years 1971-1975, was suspended pending the conclusion of the trial. On February 7, 1979, the district court (Judge James R. Miller, Jr.) entered a judgment of acquittal on the false filing charges covering 1971 and 1972. The government is now considering whether to present evidence to the grand jury for the later years.

petitioner seeking the production of certain documents believed to be in its possession (*id.* at 34a-35a).

Petitioner moved to quash the subpoenas and to terminate the grand jury investigation on the ground that the Internal Revenue Service was abusing the grand jury process by attempting to secure evidence otherwise unobtainable through its administrative process. Petitioner sought an evidentiary hearing to determine whether the government had violated the grand jury secrecy provisions of Fed. R. Crim. P. 6(e).²

In response, the government attorney handling the grand jury proceeding submitted an affidavit stating that "the grand jury is engaged solely in the investigation of criminal matters and is not gathering evidence for the purpose of using such evidence in any ongoing or contemplated civil proceeding of any kind whatsoever" (Pet. App. 35a n.5, 50a). The affidavit further stated that all IRS agents assisting the grand jury had been informed in writing that grand jury materials could not be used for civil purposes in the absence of a court order and that improper use of grand jury evidence was punishable by contempt (*id.* at 52a). Finally, the prosecutor stated under oath that the government had complied with Fed. R. Crim. P. 6(e)(2)(B) by notifying the Chief Judge of the District of Maryland of the identity of each IRS employee who had been given access to grand jury materials and that the government would continue to advise the court of the identity of any additional employees exposed to such evidence (*ibid.*).

Relying on the prosecutor's affidavit, the district court (Judge Alexander Harvey, II) held that the procedure established by the government met the requirements of

²The court of appeals noted that civil tax litigation concerning petitioner was pending in the Tax Court and that petitioner was the subject of a continuing civil audit (Pet. App. 34a n.2).

Rule 6(e) and that petitioner's "unsupported claim of potential grand jury abuse" was without merit (Pet. App. 51a). It accordingly denied petitioner's motions to quash the subpoenas and to terminate the grand jury (*ibid.*). The court also denied petitioner's request for discovery and an evidentiary hearing. Judge Harvey concluded that "[t]he target of a grand jury investigation, like [petitioner], cannot be permitted to engage in a fishing expedition of government files in an attempt to find something to support its theory of grand jury abuse, particularly where, as here, the theory has been found by the Court to be lacking in merit" (*id.* at 53a).

Petitioner sought review in the court of appeals, asserting that the district court's order was final and appealable under 28 U.S.C. 1291. In the alternative, petitioner sought a writ of mandamus to direct the district court to grant the requested relief. The court of appeals dismissed petitioner's appeal under Section 1291 on the ground the district court's order was interlocutory (Pet. App. 36a n.8). It also concluded that petitioner was not entitled to the extraordinary remedy of mandamus, holding that the government's sworn representations, combined with the safeguards contained in Rule 6(e), made it unnecessary for the district court to conduct an evidentiary hearing on petitioner's allegations of grand jury abuse at this stage of the case. "[T]he proper course," said the court, "is to let the grand jury process continue unimpeded. *** Any abuse of the grand jury process can be dealt with effectively at another time and in another manner" (*id.* at 44a).

ARGUMENT

1. Petitioner contends (Pet. 11-34) that the court of appeals erred in refusing to issue a writ of mandamus directing the district court to conduct an evidentiary hearing on the question whether the government was misusing the grand jury to gather evidence of civil tax

liability.³ But "issuance of the writ [of mandamus] is in large part a matter of discretion with the court to which the petition is addressed" (*Kerr v. United States District Court*, 426 U.S. 394, 403 (1976)), and the power to issue the writ is "sparingly exercised" (*Parr v. United States*, 351 U.S. 513, 520 (1956)). The court of appeals correctly concluded that there was no extraordinary reason to halt or interfere with the progress of an ongoing grand jury investigation (see *Cobbledick v. United States*, 309 U.S. 323, 327 (1940)) to permit an otherwise prohibited interlocutory appeal (see *In re Special March 1974 Grand Jury*, 541 F. 2d 166, 171-172 (7th Cir. 1976), cert. denied, 430 U.S. 929 (1977)), and it properly declined to issue the writ. Accord, *United States v. Grand Jury*, 425 F. 2d 327, 329-330 (5th Cir. 1970); *Lampman v. United States District Court*, 418 F. 2d 215, 217 (9th Cir. 1969), cert. denied, 397 U.S. 919 (1970). See also *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 661 (1978).

In support of its claim that the government was using the grand jury for the improper purpose of gathering evidence for civil tax purposes, petitioner (Pet. 27-30) points to: (1) the fact that the grand jury investigation began shortly after the Internal Revenue Service experienced difficulty in obtaining records in a civil audit of petitioner's tax liability and that a number of the agents assisting the government attorneys conducting the grand jury investigation had participated in the civil audit; (2) the possibility that the government was using the grand jury to obtain greater discovery than it was entitled to in pending litigation in the Tax Court; and (3) existing (since withdrawn) and withdrawn internal procedures of the Internal Revenue Service dealing with grand jury investigations.⁴

³Petitioner has abandoned its claim that the district court's order was final and appealable under 28 U.S.C. 1291 (see Pet. 10 n.14).

⁴These procedures provided, *inter alia*, that grand juries would be utilized for the purpose of obtaining the testimony of witnesses who refused to testify during the course of an administrative investigation;

These allegations amount to nothing more than the abstract possibility of abuse of the grand jury. Petitioner cites no concrete evidence to suggest any abuse in this particular case. In these circumstances, the district court was justified in concluding (Pet. App. 37a-38a) that petitioner had failed to produce sufficient proof of grand jury abuse to warrant the delay, disruption and possible breach of grand jury secrecy that would necessarily accompany an evidentiary hearing during the investigative stage of the proceeding.⁵

Moreover, while the government is not required to make a preliminary showing of proper purpose for a grand jury investigation (*United States v. Dionisio*, 410 U.S. 1, 17-18 (1973)), here the prosecutor submitted a sworn statement that "the grand jury is engaged solely in

that IRS agents would debrief witnesses following grand jury appearances in an attempt to obtain the same information the witnesses had furnished the grand jury; that if any agent assisting a government attorney in connection with a grand jury investigation prepared a report for that attorney, the report should be submitted to the agent's superior; and that, if an investigation became stymied by a series of reluctant witnesses and a grand jury proceeding was commenced on the request of the IRS, the United States Attorney or the Strike Force Attorney would be advised that jurisdiction of the tax aspects of the case remained with the IRS and the Tax Division of the Department of Justice and that recommendations for prosecution of tax violations would be processed in the regular manner.

⁵Petitioner also relies (Pet. 21-22, 28) on existing IRS internal guidelines in regard to grand jury investigations. But these provisions state that "[s]ervice personnel to whom disclosure is made * * * shall not disclose matters occurring before the grand jury to any and all others (including other Service personnel) except as deemed necessary by the attorney for the Government." Internal Revenue Manual Supplement 9G-85, §2.03 (June 30, 1978). These same rules warn IRS personnel that improper disclosures are punishable by contempt (*ibid.*). Despite petitioner's lengthly criticism of these rules (Pet. 11-27), which were not in effect at the time the district court considered the matter, they do not show any intention on the part of the Internal Revenue Service unlawfully to acquire grand jury evidence for civil purposes.

the investigation of criminal matters and is not gathering evidence for the purpose of using such evidence in any ongoing or contemplated civil proceeding of any kind whatsoever" (Pet. App. 35a, 50a). Compare *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958). As the district court recognized (Pet. App. 50a), to require the government to justify the basis for the grand jury investigation in an evidentiary hearing "would saddle a grand jury with mini-trials and preliminary showings * * * [and] assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws" (*United States v. Dionisio*, *supra*, 410 U.S. at 17. See also *United States v. Calandra*, 414 U.S. 338, 349-350 (1974); *Costello v. United States*, 350 U.S. 359, 363-364 (1956)).

Finally, and perhaps most important in determining the appropriateness of mandamus relief, the court of appeals correctly pointed out (Pet. App. 40a-43a) that petitioner's claim would not be irretrievably lost unless an appellate court acted promptly to rectify the district court's alleged error. As the court observed (*id.* at 40a), petitioner has available "other adequate means to attain the relief * * * [it] desires." *Kerr v. United States*, *supra*, 426 U.S. at 403. Specifically, Rule 6(e) provides that grand jury materials shall not be disclosed except as specifically authorized, and Rule 6(e)(1) states that a knowing violation of the rule may be punished as a contempt of court. Rule 6(e)(2) allows disclosure to "an attorney for the government for use in the performance of * * * [his] duty" and to "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law." It also provides that these government personnel may not "utilize * * * grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law." And although the

Internal Revenue Service may seek disclosure of grand jury evidence for civil use, any such disclosure is subject to judicial supervision under Rule 6(e)(2)(C)(i).

As the court of appeals properly recognized, these provisions are sufficient to protect petitioner against the possibility that grand jury evidence will be improperly used for civil tax purposes. Any “[c]ivil misuse [of grand jury evidence] can be raised in subsequent civil proceedings.” S. Rep. No. 95-354, 95th Cong., 1st Sess. 7 n.12 (1977). See *In re April 1977, Grand Jury Subpoenas*, 584 F. 2d 1366, 1370 (6th Cir. 1978), cert. denied *sub nom. General Motors Corp. v. United States*, No. 78-739 (Feb. 26, 1979); *In re Special March 1974 Grand Jury, supra*, 541 F. 2d at 170, 172; *Witte v. United States*, 544 F. 2d 1026, 1029 (9th Cir. 1976); *Coson v. United States*, 533 F. 2d 1119, 1120 (9th Cir. 1976); *In re April 1956 Grand Jury*, 239 F. 2d 263, 272 (7th Cir. 1956). Given these protections against misuse of the grand jury and the strong policy arguments against disrupting ongoing grand jury proceedings, the court of appeals correctly denied the extraordinary remedy of mandamus in this case.

2. Contrary to petitioner's further argument (Pet. 39-42), the decision below does not conflict with *United States v. LaSalle National Bank*, 437 U.S. 298 (1978). There, the Court held that an internal revenue summons is enforceable prior to the reference of the case to the Department of Justice for criminal prosecution unless the Internal Revenue Service has institutionally abandoned pursuit of the taxpayer's civil tax liability. Petitioner argues that *LaSalle National Bank* prohibited the government attorneys conducting the grand jury investigation from obtaining the assistance of IRS personnel who were familiar with petitioner's business and tax affairs because such assistance would permit the IRS to control the decision whether to prosecute.

But the conduct of the government's criminal litigation, including the decision to ask the grand jury to return an indictment, resides exclusively in the Department of Justice. See 28 U.S.C. 515. See also Fed. R. Crim. P. 7(c). The fact that some IRS supervisory personnel, other than the agents directly assisting the attorney handling the investigation, gain knowledge of evidence introduced before the grand jury hardly establishes that the Service is controlling the decision to prosecute.⁶ Moreover, as the court of appeals noted (Pet. App. 42a n.14), some participation by IRS supervisory personnel, who have the obligation to supervise the agents under their control, is not improper so long as the supervisors are aware of the prohibition upon the use of grand jury materials for civil purposes in the absence of a court order and the district court is advised of their participation pursuant to Rule 6(e)(2)(B). As the court below correctly observed, as in the case of agents assisting the attorney conducting the grand jury investigation, the sanction of contempt is available to punish improper disclosures of grand jury matters by IRS supervisory personnel. See, e.g., *In re Special March 1974 Grand Jury, supra*, 541 F. 2d at 170; *United States v. Dunham Concrete Products, Inc.*, 475 F. 2d 1241, 1249 (5th Cir.), cert. denied, 414 U.S. 832 (1973); *United States v. Hoffa*, 349 F. 2d 20, 43 (6th Cir. 1965), aff'd, 385 U.S. 293 (1966).

3. Finally, there is no merit to petitioner's challenge (Pet. 42-45) to the involvement in the grand jury investigation of IRS personnel who also participated in the civil tax audit of petitioner. The persons in question are federal attorneys whose sole client is the United States. Their assistance therefore does not present a

⁶Petitioner concedes (Pet. 37) that “grand jury assistance by IRS personnel, in itself, is [not] improper under LaSalle.”

conflict of interest. See *In re Perlin*, No. 78-2139 (7th Cir. Oct. 4, 1978), slip op. 9-11; *United States v. Dondich*, 460 F. Supp. 849, 857 (N.D. Cal. 1978).⁷

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

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⁷The court of appeals correctly refused to consider this contention because petitioner failed to raise it in the district court (see Pet. App. 41a n.13). We have discussed the issue more fully in our brief in opposition in *General Motors Corp. v. United States*, cert. denied, No. 78-739 (Feb. 26, 1979), a copy of which we are providing to petitioner's counsel.